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No. 81-2218

In the Supreme Court of the United States

October Term, 1981

UNITED STATES ex rel. JAKE LAPIN

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORP.

Respondent.

PETITIONER'S REPLY MEMORANDUM

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Ninth Circuit

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Dated: July 8, 1982

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The Respondent IBM, in its opposing brief in No. 81-2218, argues that review of this case is not warranted because the decision on appeal satisfies none of the criteria for the exercise of certiorari jurisdiction and, in any event, such decision is plainly correct. The Peti-

tioner disagrees because it has neither been made to appear nor can it ever be made to appear that this suit was based upon evidence or information in the possession of the United States at the time this suit was brought. This is because the United States neither maintained performance testing records nor provided any audit trail from which it could reconstruct the underlying computer rentals from IBM by the various federal agencies authorized to make calls under the open end contracts between GSA and IBM.

So much of the District Court record which has been incorporated as App. A-27 through A-35 in this Petition No. 81-2218 clearly shows that the decision on appeal was based on erroneous findings of fact by the trial judge and/or his resolution of certain apparent inconsistencies in

Petitioner Lapin's pleadings in favor of the Respondent IBM. Indeed, the Petitioner's prefiling disclosures in App. A-27 did not and could not alert the United States to any wrongdoing on the part of the Defendant IBM which could support a False Claims suit under 31 U.S.C. 231 and these innocous disclosures did not constitute all of the Petitioner's original evidence or information. Indeed, some of the original informtion which was withheld from the United States is included in App. A-33 and such information was obtained by the Petitioner Lapin after he left Government service and acted as a private citizen.

Also, the disclosures in App. A-27 through A-35 trigger the Rippetoe exception or a Rippetoe-like exception. Such an exception would allow the private

prosecution of this action not only because the Government lacks the information to bring a False Claims suit but as well because its own officials violated certain public laws which were intended to prevent the Government from being overbilled in the first instance and then other officials concealed these violations in an official audit report submitted to Congress through the Special Counsel of the Merit Systems Protection Board.

Certain information and evidence which was accepted by the United States Court of Appeals for the Ninth Circuit and which was incorporated, by reference, in Petitioner Lapin's Petition for Rehearing as Exhibits "A" through "E" clearly shows that the Ninth Circuit not only had departed from the accepted and

usual course of judicial proceedings but sanctioned as well a similar departure on the part of the District Court, as to call for an exercise of this Honorable Court's power of supervision over these two lower federal courts.

Specifically, after the Ninth Circuit allowed the Respondent IBM to introduce into evidence four copies of GSA Audit Report 2S-00232-00-11 prepared by the Office of Audits of the Office of the Inspector General of the GSA for use by Congress, the Petitioner Lapin submitted four copies of five related documents in the public record in order that the Ninth Circuit Panel would have access to a complete public record concerning the purpose and validity of this GSA Audit Report. This Audit Report was prepared as a result of certain testimony by the

Petitioner Lapin around March 5, 1980 before a Congressional Subcommittee concerning reprisal actions taken against Government employees (whistle blowers) who attempted to either disclose and/or to correct that waste, fraud, or abuse Congress had intended to have disclosed and corrected.

Among other things, these five documents contain factual information which (a) triggers the Rippetoe exception; (b) shows that the GSA is unable to claim refunds due the United States for all overbillings it authorized IBM to submit for payment because the cognizant federal agencies renting such computers did not maintain the performance test records prescribed by IBM and for which IBM would accept as the only basis for determining overbillings and for formally claiming

refunds from IBM; (c) shows that Government officials engaged in illegal and prohibited contracting practices and violated the controlling provisions of the annual contracts with IBM when they permitted IBM to bill in an amount in excess of that chargeable or bill prior to acceptance; (d) shows that the persons charged with investigating and correcting these conditions by vigorously pursuing refunds due the United States concealed such conditions and otherwise prevented an investigation in process by the FBI of IBM's billing practices from being completed; and, (e) shows that the Executive Office of the President, Office of Management and Budget supports this qui tam action and has referrred these matters to the Department of Justice's Office of Professional Responsibility for action.

The Ninth Circuit Panel apparently did not consider these five documents in formulating its decision. The Petitioner Lapin believes that its failure to do so constituted such a departure from accepted and usual judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

The Respondent IBM admits that all payments by the Government for computer rentals between the date of installation and date of acceptance constitute over-payments for which refunds are due the Government. However, IBM will only pay refunds that are based on those formal performance test records it required the Government to maintain and which IBM, in fact, knows are not maintained by the various federal agencies which placed rental orders under the basic contract.

Thus, when the Petitioner Lapin submitted a formal claim for refund of $56,000 on a single model 360-50 rental transaction during 1968 when this model computer was rented to replace a model 1410, IBM would not process this official claim for refund even though it was aware that the Petitioner Lapin was then an internal auditor employed by the Office of the Secretary of Defense. Since no performance test records had been maintained by the federal agency renting this model 360-50 computer, the Petitioner Lapin based his claim for refund on the performance test records maintained by the Respondent IBM. However, the Petitioner Lapin was precluded from taking further action on this matter because he was involuntarily removed from the audit by persons in supervision who were more interested in concealing these conditions

than in correcting them.

Unless this Honorable Court grants this Petition, IBM will be permitted to permanently retain its ill-gotten gains with impunity and the existing conflicts among the Courts of Appeals concerning the jurisdictional bar will continue to exist. So far as these conflicts are concerned, it would appear that the United States Court of Appeals for the District of Columbia would have ruled differently on this case. The Petitioner contends that the Ninth Circuit should have applied District of Columbia law since the basic computer rental contract between the Government and IBM was negotiated in the District of Columbia.

The Petitioner Lapin has made a showing that the decision on appeal is not only contrary to expressed Congressional

intent but defeats the essential purpose of the False Claims Act as well because the Petitioner Lapin is not and never was in a race with the Government to the courthouse. Indeed, the Petitioner Lapin has acted because of a moral obligation and a statutory duty, based on his previous civil servant status, his oath of office, and the solicitations made by the GSA and GAO hot lines, to help enforce those federal laws which require the United States Treasury to be made whole again. The Petitioner Lapin has gone on record that he is willing to turn over this suit to the Government whenever the Government can demonstrate that it is as desirous of pursuing the refunds due the United States as vigorously as the Petitioner Lapin is.

Accordingly, this Honorable Court

should either defer considering the Respondent IBM's opposition to Lapin's Petition for a Writ of Certiorari until such time as IBM voluntarily makes refund, ab initio, of all amounts it overbilled the United States or grant the Writ in order that Lapin can proceed to make the United States Treasury whole again. This request is based on the fact that Lapin has made a showing that the App. A-27 disclosures to the United States had been solicited by the Government by its promise of correction and that Lapin has otherwise satisfied the criteria for the exercise of certiorari jurisdiction.

Respectfully submitted,

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